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Supreme Court of the United States

OCTOBER TERM 1940

No. 119

PHILIPPINE NATIONAL BANK,
Petitioner,

versus

PHILIPPINE TRUST COMPANY AND INSURANCE SOCIETY OF CANTON, LTD.,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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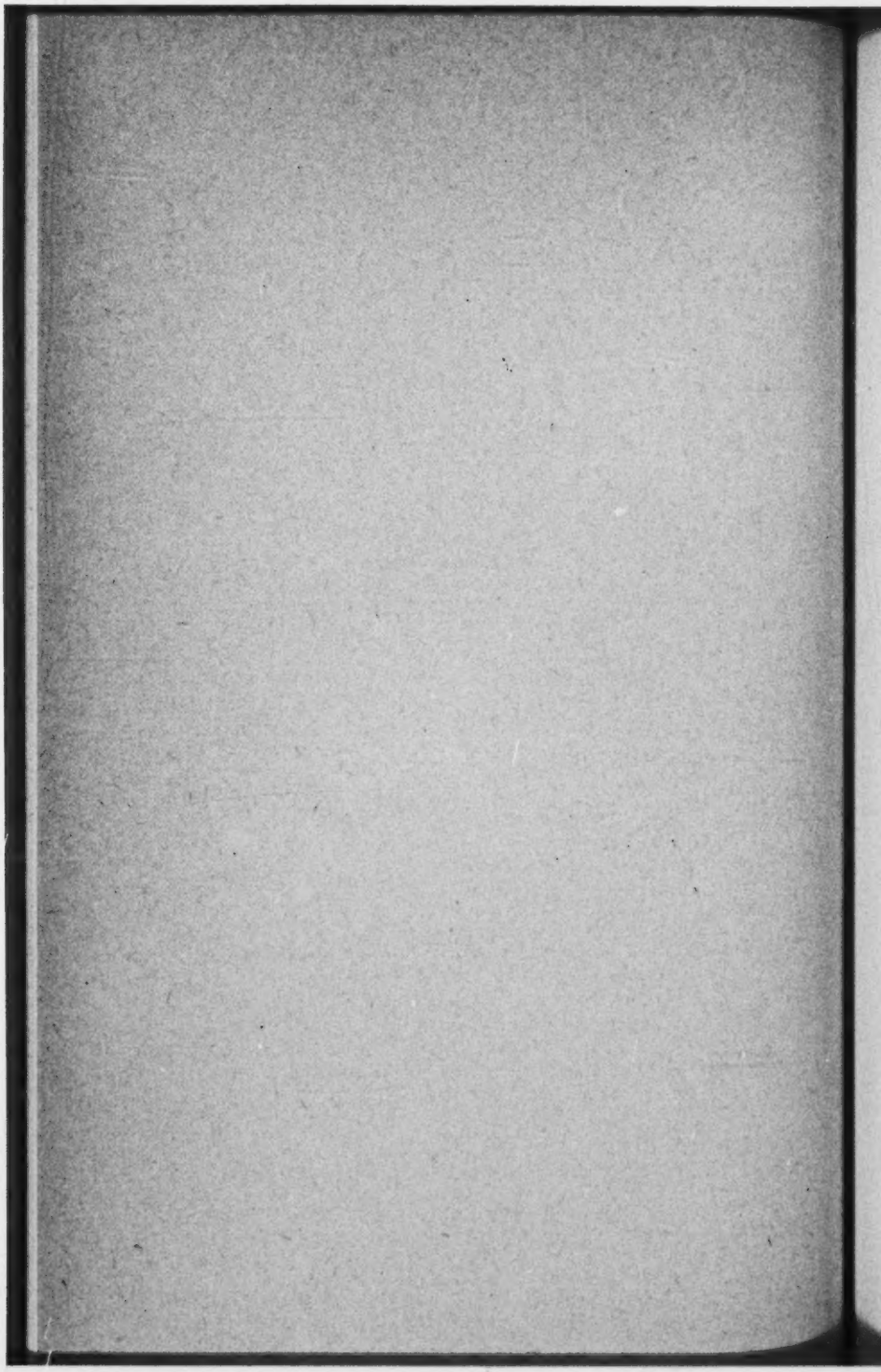

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Respondents oppose the petition for writ of certiorari and pray that the same be denied for the following reasons:—

1. The petition is entirely without merit.

2. The only reason stated for the allowance of the writ is that "the decision of the Supreme Court of the Philippines *has departed from the accepted and applied principles and mandates of law and equity*, an action which justifies the exercise of this Honorable Court's power of supervision." (Pet. p. 26.)

3. The only questions raised by the petition are of fact and interpretation of documents, and all of which questions were resolved by the Court of First Instance and the Supreme Court against the contention of petitioner. (Pet. pp. 28-30.)

4. The supporting brief violates Clause (d), Paragraph 2 of Rule 27 in that it does not contain a concise statement of the case.

(*) Italics ours throughout.

STATEMENT OF THE CASE

Petitioner, the Philippine Government Bank, sued for and failed in both the Court of First Instance of Manila and the Supreme Court of the Philippines to recover damages of Two Hundred Fifty Thousand Pesos (₱250,000.00), Philippine Currency, plus legal interest, for the alleged breach of a contract dated September 1, 1924, between petitioner and respondents, marked Exhibit "J." (R. 110-115.)

The respective contentions of the parties are set forth with sufficient clarity in the amended complaint of February 2, 1935 (R. 2-7) and in the reamended answer of May 31, 1935 (R. 8-13), supplemented by the amendment of Clauses 3 and 4 of the First Special Defense and of Clause 3 of the Second Special Defense of said reamended answer, with the consent of petitioner, to conform to the agreed facts as set forth in Paragraph 21 of the Stipulation of Facts. (R. 24-26.)

COUNTER-STATEMENT OF ESSENTIAL FACTS (*)

In view of the fact that petitioner's statements under the caption "Statement of the Matter Involved" (Pet. pp. 2-19) and under the caption "Summary of Essential Facts" (Pet. pp. 19-21) and under the caption "Decisions of the Court of First Instance of Manila and of the Supreme Court" (Pet. pp. 21-23), consist of extracts, excerpts and, in some instances, copies in full of certain selected parts of the documentary evidence attached to the Stipulation of Facts, interspersed with argumentative comments and of insignificant excerpts of said decisions of the Court of First Instance and of the Supreme Court, and which extracts,

(*) All exhibits will be referred to by the letter designations used in the Stipulation of Facts. (R. 27-165.)

excerpts and copies on the whole tend to confuse rather than clarify the stipulated facts and record, respondents submit the following counter-statement:

The facts directly controlling the question of liability or non-liability of respondents to petitioner are those recited in the agreement of September 1, 1924 (Exhibit "J," R. 110-113) in connection with the recitals of the agreement of January 5, 1923 (Exhibit "C," Record 80-83) which was cancelled in Exhibit "J." With the exception of certain undisputed stipulated incidental facts, these agreements were pleaded and relied upon by petitioner as its sole basis for recovery and by respondents as their sole ground to defeat such recovery, as disclosed by the amended complaint and by the reamended answer.

These agreements were attached to the original typewritten complaint as Exhibits "A" and "B" and referred to in the reamended answer under the same identification marks; but they are printed only as Exhibits "C" and "J" of the Stipulation of Facts. (R. 80-83; 110-113.)

The deed of trust which was attached to and made a part of the original typewritten answer as Exhibit "1" is printed in the record only as Exhibit "A" of the Stipulation of Facts (R. 27-76), while the second mortgage of Two Hundred Fifty Thousand Pesos, Philippine Currency, sought to be collected by petitioner from respondents in this action is printed as Exhibit "B" of the Stipulation of Facts. (R. 76-80.)

The decision of the Court of First Instance of Manila (R. 165-185) contains a statement of all the pertinent facts necessary to a correct determination of the case. The decision of the Supreme Court of the

Philippines (R. 208-240) affirming that of the lower court, also contains a more comprehensive statement agreeing in all respects with that of the Court of First Instance except as to a clerical error to which we called attention in our answer to petitioner's motion for reconsideration before the Supreme Court of the Philippines. In this clerical error, no doubt attributable to the typist, Exhibit "F-1" was confused in the findings with Exhibit "F" and the Court was made to say:

> "This letter Exhibit F-1 was submitted to the Board of Directors of the plaintiff Bank on July 18, 1924 (Exh. G) which accepted the propositions therein contained, except paragraphs 3 and 4 which it wanted understood and read as follows: etc." (R. 228.)

In the answer to petitioner's motion for reconsideration, respondents referred to the foregoing clerical error as follows:

> "Before closing, we wish to call the attention of this Honorable Court to the fact that it was Exhibit F and not Exhibit F-1 which was referred to in Exhibits G, H and I and I-1 and which was incorporated with some modifications into Exhibit J. On pp. 17 and 18 of its decision, this Honorable Court quotes Exhibit F-1 which reads as follows:
>
> "Exhibit F-1
>
> "(This exhibit is literally and fully copied in the decision of the Supreme Court of the Philippines dated May 12, 1939, pages 227 to 228 of this transcript.)
>
> "This Honorable Court then states: 'This letter Exhibit F-1 was submitted to the Board of Directors of the plaintiff bank the 18th of July, 1924 (Exhibit G) and the propositions contained therein were accepted with the excep-

tion of those contained in paragraphs 3 and 4 which it wished to be understood and read as follows: * * *. An inspection of Exhibit G shows that it was Exhibit F and not Exhibit F-1 which was considered at the Board of Directors' meeting recorded in Exhibit G. Exhibit F-1 was rejected in toto by the Board of Directors of the defendants and Exhibit F was submitted to the Philippine National Bank in its place before the Board of Directors' meeting recorded in Exhibit G was held. Exhibit F reads as follows:

"Exhibit F.

"(This exhibit is literally and fully copied in the documentary evidence of this case, pages 100 to 102 of this transcript.)

"Exhibits G, H, I and I-1 all refer to Exhibit F and not to Exhibit F-1. This letter Exhibit F shows clearly the defendants' refusal to guarantee the second mortgage of the plaintiff. (Pages 3-6, Answer to Motion for Reconsideration.)" (R. 244-245.)

While more appropriately a part of the argument, we add to the foregoing as a matter of sequence the following comment:—

In view of the fact that Exhibits "F" and "F-1" were mere negotiations leading up to the agreement Exhibit "J" of September 1, 1924, and were necessarily merged in that agreement, the clerical error in the decision after explanation is of no moment. Exhibits "F," "F-1," "G," "H," "I," and "I-1" cited in the petition under the caption "Statement of the Matter Involved" at Pages 5-9, are incompetent except as they may throw light if any on Exhibit "J" which is clear in itself and in which those exhibits are merged.

For the sake of brevity, we adopt as our counter-statement of facts the statements of both the Philippine Courts except the clerical error of the decision of the Supreme Court above specified, pointing out at the same time that those statements with the exception noted though more comprehensive agree in substance with the first and second special defenses of the reamended answer.

To guide the Court to some extent in checking up some of the documentary evidence supporting the contention of respondents, we point out that paragraph 1 of the first special defense (R. 8-10, 24-25) is supported by Exhibit "A" attached to the Stipulation of Facts, the document marked Exhibit "1" in said paragraph 1 having been printed as Exhibit "A" of the Stipulation of Facts.

Paragraph 2 of the first special defense is supported by Exhibit "E" of the Stipulation, offered in evidence by petitioner (R. 97) and by the statement of petitioner in Clause 3, Page 3 of its Petition.

Paragraphs 3 and 4 of the first special defense are supported by Exhibits "P," "Q," "A" of "Q" and "B" of "Q," "R," "S," "T," "One," "U," "V," "W," "L-3" to "L-6," "M" and "N." (R. 145-146; 147-148; 149-151; 151-153; 153-155; 155-157; 157-159; 159-160; 160-161; 162-164; 164-165; 125-131; 131-136; 136-139.)

A connecting link in the facts not mentioned in the re-amended answer of respondents is that the Philippine Trust Company as Trustee sold and assigned to the Right Reverend M. J. O'Doherty, the Roman Catholic Archbishop of Manila, a corporation sole, ₱5,490,481.25 of its preferred claim as Trustee against the Mindoro Sugar Company "for expendi-

tures and advances made as Trustee." When the Archbishop bought the property on its sale by his successors as Trustees, he applied the amount bid by him on account of the preferred claim for advances acquired as aforesaid. (See Exhibits "A" of "Q," and "V"; R. 149, 162.)

The second special defense (R. 10-13, 25-26) is based on the exhibits therein mentioned but such exhibits are found in the printed record under changed markings as follows: Exhibit "A" printed as Exhibit "C" and Exhibit "B" printed as Exhibit "J."

At this point, respondents call attention to a statement at Page 14 of the Petition which might be considered equivocal and hence misleading. Petitioner says:

> "Even if the deed of transfer says that the foregoing is a 'preferred claim,' it can be observed that this 'preferred claim' is not included as such under Section 10 of Article 2 of the Deed of Trust. (Exh. 'A,' page 27.)"

Notwithstanding the foregoing statement, the preferred character of the claim of the Trustee for advances is clearly provided by the first paragraph of Section 12. (R. 64-65.)

In view of the circumstance that there are no disputed facts in the case but only a disputed interpretation of Exhibit "J," and particularly Clause 2 thereof, as shown by the decisions of the Court of First Instance and of the Supreme Court of the Philippines and as emphasized by the fact that such disputed interpretation is the sole ground for petitioner's only assignment of error (Brief, p. 28), and in view of the further circumstance that no other findings of the decisions of said courts are directly challenged by the

petitioner, respondents will make no further comments on the contents of the petition except incidentally in connection with their argument.

ARGUMENT

POINT 1.

The Petition Is Entirely Devoid of Merit.

Petitioner under the caption "OUR FUNDAMENTAL CONTENTION — THE NULLITY OF THE CONTRACT SHOULD NOT BE DEDUCED IF THERE IS A REASONABLE MEANS OF UPHOLDING ITS VALIDITY" (Pet. pp. 24-25), says:

> "As may be observed, the decision of the Honorable Supreme Court of the Philippines hinges upon the argument that the purchase of the properties of the Mindoro Sugar was optional on the part of the respondents, who were the holders of the bonds and who had in their hands the life and death of the Mindoro Sugar and the control of its trustee; that it was also optional on their part to sell them afterwards; that, hence, it was optional on the part of said respondents to comply or not with the obligation they contracted of providing for the payment of the plaintiff's credit, and that, therefore, they could shirk with impunity the control which they exercised over the business and leave the plaintiff entirely helpless as regards the collection of his credit, or likewise lie back idle in the event of the sale of the Mindoro Sugar properties." (Pet. p. 24.)

This eloquent plaint which creates straw men only to demolish them might even excite sympathy for petitioner if it had the slightest foundation in truth or in fact, that is to say, either in the obvious purpose or in the reasonable interpretation of the second clause

of Exhibit "J." This obvious purpose and reasonable interpretation are clearly set forth in the second special defense of the reamended answer (R. 10-13), supplemented by its amendment in the Stipulation of Facts as aforesaid (R. 25-26) and are, as previously stated, accepted in substance in both the decision of the Court of First Instance of Manila (R. 165-185) and that of the Supreme Court of the Philippines affirming it (R. 208-240). Nevertheless, the petitioner has studiously refused to understand or discuss such obvious purpose and reasonable interpretation although expressed in the simplest form of which the English language is capable. (See entire supporting brief of petitioner, p. 28, et seq.)

Contention of Petitioner too General and Indefinite to Admit of Brief Answer

Respondents frankly confess that they have been unable to find within the seventy-three pages of the petition and supporting brief any concise, definite statement of the contention of petitioner which is even remotely supported by the stipulated facts.

The only statement which approaches conciseness is the paragraph at the bottom of Page 29 of the Supporting Brief as follows:

> "In opposition to this interpretation, the Bank contends that the true intention of the parties in stating that the defendants herein acknowledged its second mortgage and that in the event of a sale were bound to make satisfactory arrangements with the purchaser for the payment of such mortgage credit, was not the creation of an obligation subject to a suspensive condition, but the creation of one subject to a period or term whose date or mode of payment was not fixed."

The statement just quoted is so utterly at variance with the literal and obvious meaning and interpretation of Clause 2 in relation to Clause 5 of Exhibit "J" that its strongest impeachment lies in a simple comparison of its language with the language of the contract itself, without the necessity of going into the reasons for the optional, conditional character of the obligation which are equally incompatible with the quoted statement. All the remainder of the petition and supporting brief consists of inapplicable generalizations and technical dissertation in the nature of a lecture on the subject of contracts. However, based upon the last quoted statement (Pet. p. 29) and the previously quoted declaration of petitioner's "fundamental contention" (Pet. p. 24), accompanied by petitioner's only specification of error (Pet. p. 28), followed by the caption "the interpretation accepted by the decision appealed from is absurd" (Pet. p. 30) and the authorities cited on Page 31 and at intervals throughout the remainder of the brief on the subject of treating certain obligations as absolute notwithstanding the use of conditional phrases in the recital thereof, the only conclusion we can reach is that petitioner's true contention, in a word, is that the obligation to arrange for payment in Clause 2 in relation to Clause 5 of Exhibit "J" is absolute. In the absence of anything more definite or concise in the petition and supporting brief, respondents have nothing more tangible than this conclusion to answer and, if they are to offer any assistance to the Court, they are driven to the necessity of simply taking the negative of petitioner's general contention by stating as many of the facts and reasons as suggest themselves why the optional, conditional obligation of Exhibit

"J" is optional and conditional, which is something like arguing the self-evident propositions that white is not black and that daylight is not darkness. The greatest objection to this form of answer on the part of respondents is that it must necessarily consume more space than is sanctioned by the Rules of this Court.

Analyzing further petitioner's "fundamental contention" (Pet. p. 24) in which straw men dominate, let it be said: "The nullity of the contract" (Clause 2 of Exhibit "J") was not "deduced" by the Philippine Supreme Court or sought by respondents. On the contrary, its validity was upheld by that Court. In so upholding the validity of Paragraph 2 of Exhibit "J," the Supreme Court upheld the contention of respondents that the purchase as well as the sale of the properties of Mindoro Sugar Company was entirely optional with them (respondents).

Respondents have not contended and the Philippine Courts have not held that "it was optional on the part of said respondents to comply or not to comply with *the obligation they contracted of providing for the payment of the plaintiff's credit*" because respondents did not contract any obligation "*providing for the payment of plaintiff's credit.*"

Respondents did agree conditionally as provided in Clause 2 of Exhibit "J":

> "2. The Second Mortgage of ₱250,000.00 of the Philippine National Bank *to be recognized by the parties of the Second and Third Parts in the event of a sale of the properties of the Mindoro Sugar Company by the said parties when provision will be made whereby the purchaser*

will make satisfactory arrangements for the payment of the amount of the Mortgage of the Philippine National Bank." (R. 111.)

Attention is called to the fact that although the "Philippine Trust Company, Trustee Mindoro Sugar Company," was the Party of the First Part of Exhibit "J," the conditional obligation of Clause 2 thereof was expressly limited to the respondents as parties of the second and third parts, leaving the Trustee entirely free therefrom.

Aside from the fact that no attempt was made to obligate the Trustee by the terms of Exhibit "J" except to evidence its consent to the agreements of the other three parties, it is clear that the Trustee as the representative of Mindoro Sugar Estate for the benefit of the bondholders had no power or authority to obligate itself as did the other three parties by the terms of Clause 2 of Exhibit "J."

It is an indisputable fact that the title of the Philippine Trust Company as Trustee to the property of Mindoro Sugar Company could not be considered as inuring to the benefit of the respondents for the purpose of "a sale of the properties of the Mindoro Sugar Company by the said parties" (of the second and third parts) as provided in Clause 2 of Exhibit "J." (Decision Supreme Court, R. 236.)

This supports the contention of respondents and the opinions of the Court of First Instance and Supreme Court that both the acquisition and sale of the property were conditions indispensable to any obligation of respondents to make arrangements with a buyer about the payment of the second mortgage. (R. 183-184; 234-240.)

It is, therefore, clear that even though the Philippine Trust Company had not resigned but had continued as Trustee until after the sale of the property under the Trust Deed, such sale would not have created any liability on the part of respondents under Clause 2 of Exhibit "J." The sale and, therefore, the acquisition had to be made by respondents themselves who were the parties of the second and third parts in Clause 2 of Exhibit "J."

Refutation of Petitioner's Specification of Errors.

Petitioner opens its supporting brief with the following:

"SPECIFICATION OF ERRORS

> "The Supreme Court of the Philippines erred in not declaring that the respondents contracted a valid obligation by virtue of Clause 2 of Exh. 'J' in relation to Clause 5 of said exhibit and that by transferring a part of their credits to the Archbishop of Manila and by ordering or acquiescing in the sale of the properties of the Mindoro Sugar by its trustees, without making satisfactory arrangements for the payment of the mortgage credit in the amount of $125,000.00, U. S. Cy., (₱250,000, Philippine Currency), they have committed a breach of contract and defrauded as well as damaged the Bank in the above indicated sum together with the interest and attorney's fees as provided in Exh. 'B'." (Pet. p. 28.)

Before proceeding with the refutation of the foregoing specification of error, we present in chronological order a brief summary of the more essential facts which should be kept in mind in the consideration of the petition, as follows:

Chronological Summary of Facts

(a) On December 21, 1917, the Mindoro Sugar Company executed a Deed of Trust in favor of the Philippine Trust Company as Trustee for the bondholders secured by a first mortgage on the property rights and franchises of said Mindoro Sugar Company to meet the payment of the bonds and interest. (R. 27-76.) This Trust Deed also provided that all the expenses and advances of the Trustee in the operation of the trust estate should constitute a lien on the property with preference over the other obligations secured by such Trust Deed (Article IV, Section 12, first paragraph; R. 64-65).

(b) On April 14, 1921, a second mortgage was given on the same property by the Mindoro Sugar Company to petitioner to secure the payment of ₱250,000.00. This mortgage expressly recognizes the priority of the Deed of Trust (Exhibit "A").

(c) On December 31, 1921, the Mindoro Sugar Company defaulted in the payment of the semestral interest due on the bonds secured by the trust deed.

(d) In September, 1922, the Philippine Trust Company as trustee took possession of the property of the Mindoro Sugar Company pursuant to the terms of the trust deed and began the operation thereof.

(e) The Mindoro Sugar Company also defaulted in the payment to petitioner of the obligation secured by the second mortgage.

(f) On January 5, 1923, the plaintiff and the respondents entered into the agreement Exhibit "C" (R. 80-83) for the purpose of further financing the operation of the property in an effort to insure the payment of the obligations under the trust deed Exhibit "A" and petitioner's second mortgage and in the

hope that they would, in addition, be able to make a profit therefrom. In order to obtain any profit which might arise from the successful operation of the property, Exhibit "C" provided that the Mindoro Sugar Company should be divested of all of its interest in the property through the foreclosure by petitioner of its second mortgage (R. 82). Petitioner agreed to bid the property in at the foreclosure sale and transfer the title to the property so obtained to a partnership or corporation to be known as the San Jose Development Company which was to be composed of petitioner and respondents as equal partners (R. 82). To compensate petitioner for the extinction of its second mortgage, the San Jose Development Company was to give it another second mortgage on the property for the sum which might be bid for the property by petitioner at the foreclosure sale. Respondents and petitioner were then to operate the property through the San Jose Development Company and advance the necessary funds therefor peso for peso for as long as the money should be needed. Finally Exhibit "C" expressly provided that:

> "The San Jose Development Company shall own, maintain and operate the said property, rights and franchises *subject to the Trust Deed executed by the Mindoro Sugar Company in favor of the Philippine Trust Company* under date of December 21, 1917. The income of the said company, *after providing for all interest due on the bonds* covered by the Trust Deed aforesaid, shall be applied pro rata to the payment of the advances made by the parties hereto and thereafter:

"1. To the payment of interest and other obligations as they mature under the 3,000,000 Bond Mortgage.
"2. To the payment of the amount due the Bank for the purchase price of the property.
"3. To the owners." (R. 82-83.)

(g) Though it was hoped by the parties that after the acquisition of the property its operation by the San Jose Development Company would pay them dividends, they did not intend to keep the property indefinitely. They hoped that after the property showed a profit in its operation, it would be possible for the San Jose Development Company to sell it subject to the trust deed for enough to pay off petitioner's second mortgage and give the parties a profit. Exhibit "E," a memorandum of Mr. M. H. O'Malley, an officer of the Philippine Trust Company (R. 97-101), which was offered in evidence by petitioner, expressed the hope and outlined the anticipated procedure.

> "When execution is accomplished on this mortgage, the property covered thereby will be bid in by the operating partnership, operated for joint account under our said agreement until such time as it shows a profitable out-turn, and then sold, any profit resulting to be divided equally between the Bank, the Union Insurance Society of Canton, and the Philippine Trust Company." (Exhibit "E," R. 99.)

(h) Pursuant to Exhibit "C," petitioner obtained a judgment of foreclosure on its second mortgage. This judgment expressly recognized the priority of the Trustee's rights under the trust deed (Exhibit "D-1," R. 91-95). However, petitioner did not proceed to the sale of the property as provided in Exhibit "C" because it wished to withdraw from that agreement.

(i) Thereupon, petitioner negotiated for its withdrawal from Exhibit "C" and incidentally for the disposition of its second mortgage. Respondents' executive officers in an excess of optimism with reference to the value of the property mortgaged suggested that respondents take over and pay petitioner's second mortgage (Exhibit "F-1," R. 103-104). This proposition was, however, promptly rejected by respondents' boards of directors and the letter Exhibit "F" (R. 101-103) was then written to petitioner in which the following significant statement was made:

> "Referring to letter addressed to you on June 17th by Mr. W. D. Clifford, Vice-President of the Philippine Trust Company, and Mr. H. Hunter, Branch Manager of the Union Insurance Society of Canton, Ltd., regarding Mindoro Sugar Company, we beg to state that we are not agreeable to proposition set forth in the said letter in the form submitted. We are of the opinion, after receiving legal advice, that the agreement entered into on January 5, 1923, by and between the Philippine National Bank, the Union Insurance Society of Canton, Ltd., and the Philippine Trust Company regarding the financing of Mindoro is binding upon the National Bank and that it can not be relieved of its responsibility thereunder without consent of our respective companies. We are further of the opinion that the bondholders of Mindoro are under no obligation with respect to the mortgage held by the National Bank and we can not see our way clear to guarantee the payment of said mortgage at any particular time." (R. 101-102.)

Respondents, however, were willing to release the petitioner under certain conditions from its obligation

to assist in the financing of the property after the existing crop was harvested.

(j) As a result of the aforesaid negotiations, petitioner and respondents, on September 1, 1924, entered into the agreement Exhibit "J" which had for its main purpose the cancellation of Exhibit "C." Exhibit "J" provided that the petitioner should only "continue to advance one-third of the expenses necessary for the carrying on and operation of the Mindoro Sugar Estate until the crop at present in the field is harvested" (R. 112). Petitioner was fully protected as to the above advance as well as to previous advances by the fact that all advances for the operation of the property were preferred by the terms of the trust deed (Section 12, Article IV, Exhibit A; R. 64-65) and also by the provision of paragraph 4 of Exhibit "J" which reads as follows:

> "If the share of the said proceeds pertaining to the Bank should not be sufficient to cover the advances made by the said Bank, the balance unpaid shall be paid to the Bank out of the proceeds of the 1925-1926 crop and further that if the advances already made for the 1923-1924 crop shall not have been fully paid, including interest, any balance unpaid shall be paid to the Bank out of the proceeds of the said 1924-1925 crop, and if the same is not totally paid to the bank out of the proceeds of the said 1924-1925 crop, the balance owing shall be paid out of the proceeds of the 1925-1926 crop. If the proceeds of the sale of said 1925-1926 crop are not sufficient to cover the unpaid balance, the Philippine Trust Company, as Trustee, shall execute a chattel mortgage on the subsequent crops until the whole amount due, with interest, is paid." (R. 112.)

Respondents still clung to the idea that they might make a profit out of the operation of the property. (See Exhibit "E," Record 97-101.) For that reason paragraph 5 was inserted in Exhibit "J" to provide respondents with the machinery, if they wished to use it, for obtaining title to the property subject to the trust deed.

> "5. The foreclosure proceedings instituted by the Bank shall remain in statu quo as long as the Philippine Trust Company and the Union Insurance Society of Canton, Ltd. continue to finance the crop and operation of the Mindoro Sugar Estate with the understanding that if at any time the Philippine Trust Company and the Union Insurance Society of Canton, Ltd., or either one, desire it, the Bank will proceed to the sale of the properties under the judgment of foreclosure or will assign the said judgment to the Philippine Trust Company and the Union Insurance Society of Canton, Ltd., or to either, or their nominee as they or either one may desire." (R. 112-113.)

The acquisition of the title to the property was made entirely optional with respondents. Petitioner was protected as to the above quoted clause 5 of "Exhibit "J" in that it was required to maintain the foreclosure proceedings in statu quo only so long as respondents continued to finance the property. It was also provided that if respondents took over and made a sale of the property, they would make satisfactory arrangements with the purchaser for the payment of petitioner's second mortgage.

> "The Second Mortgage of ₱250,000.00 of the Philippine National Bank to be recognized by the parties of the Second and Third Parts in the event of a sale of the properties of the Min-

doro Sugar Company by the said parties when provision will be made whereby the purchaser will make satisfactory arrangements for the payment of the amount of the Mortgage to the Philippine National Bank." (Par. 2, Exhibit "J," R. 111.)

(k) After the execution of Exhibit "J," respondents continued to finance the operation of the property for five years advancing many millions of pesos for that purpose. (See Exhibit "A" of "Q" and Exhibit "B" of "Q" and Exhibit "R," Record 149-151; 151-153; 153-155.) Respondents finally recognized the impossibility of selling the property at a profit as contemplated in Mr. O'Malley's memorandum (Exhibit "E," supra). They did not, therefore, utilize the option of acquiring the property, contained in Exhibit "J." Respondents did, however, offer to pay ₱13,601.84 for petitioner's second mortgage for the sole purpose of utilizing the existing foreclosure judgment to sell the property for the benefit of the obligees secured by the trust deed. This would have enabled them to escape the expense and delay involved in the sale of the property under the trust deed itself. (See Exhibits "O" and "O-1"; Record 139-141; 142.) Moreover, the amount offered was less than the prospective attorney's fees and expenses of defending petitioner's threatened suit. Petitioner, after considering the offer for almost a year, on February 15, 1929 finally rejected it, giving as a ground therefor a "general understanding" with the Philippine Trust Company that its second mortgage would be paid in full. (See Exhibits "O-1," "O-2," "O-3" and "O-4," Record 142, 143, 144; and Stipulation of Facts, R. 21.)

(l) Afterwards in the same year (1929) upon the insistence of the Bank Commissioner (Exhibit "P," Record 145-146), the Philippine Trust Company gave up the financing of the property and assigned its claim for the unpaid portion of its advances amounting to ₱5,500,000.00 to the Archbishop of Manila. (Stipulation of Facts, R. 22; Exhibit "A" of Exhibits "Q" and "R," Record 149-151; 153-155.) The Philippine Trust Company also resigned as Trustee under the trust deed and the Archbishop was elected as the new Trustee. In view of the fact that almost ten million pesos was due and unpaid under the trust deed (see Exhibit "B" of Exhibits "Q" and "R," Record 151-153; 153-155), the Trustee decided to sell the property in pursuance of the terms of the trust deed and the property was, therefore, advertised for sale, but such sale was postponed and readvertized to give it more publicity.

(m) The Archbishop of Manila, after the first advertisement on June 14, 1929, resigned as trustee. New trustees were elected and after a second advertisement the property was sold on November 4, 1930, to the Archbishop of Manila for ₱3,000,000.00, leaving unpaid under the trust deed more than six million pesos including the original bond issue of ₱3,000,000.00.

(n) Inasmuch as Counsel for petitioner has gone entirely outside the record to insinuate in substance that the assignment of the preferred claim for advances by the Philippine Trust Company to the Archbishop was fictitious and collusive and for the purpose of defrauding petitioner (Pet. pp. 62-72), the undersigned claim the privilege of also going outside the record to assure the Court of their personal knowledge that when the Archbishop ascertained that the Philippine Trust Company, a banking institution in which his Diocese

was heavily interested, had made advances for the financing of the Mindoro Sugar Company which might endanger the funds of the depositors of the Philippine Trust Company, he actually bought and took an assignment of the Philippine Trust Company's claim for such advances and, at a great sacrifice to himself, borrowed at least $2,500,000.00 in the United States with which to take over the claim for advances and did actually become the owner thereof and did actually deliver the money to the Philippine Trust Company; that he has been paying interest ever since on the money thus borrowed and that the purchase of the Mindoro Sugar Estate has proven a losing investment.

No Consideration for Clauses 2 and 5 as Interpreted by Petitioner

Aside from the clear conditional form of the clauses, there was no conceivable motive, reason, consideration or *causa* for the agreement as construed by petitioner. One of the essential requisites of a binding agreement is *causa* (Article 1261, Philippine Civil Code).(*) *Causa* is the civil law counterpart of common law *consideration.* It may be better defined as the motive or reason for entering into a contract. We will show that there was no *causa* for the alleged agreement, not for the purpose of invalidating it, if it ever existed, but for the purpose of convincing the Court that no such agreement was ever perfected or intended to be perfected. It is inconceivable that respondents

(*) Art. 1261. There is no contract unless the following requisites exist:

1. The consent of the contracting parties;
2. A definite object which is the subject-matter of the contract;
3. A *consideration* for the obligation established.

entered into an unconditional agreement to provide for the payment of petitioner's second mortgage with out any reason therefor and while much of their preferred claim for advances to the Trustee went unsatisfied.

Another unanswerable refutation of petitioner's interpretation of Clauses 2 and 5 of Exhibit "J" is that all the obligations of petitioner as recited in Exhibit "J," and vastly more onerous obligations, had already been contracted by it in Exhibit "C" from which it was released at its own request by Exhibit "J." Hence the diminished obligations in Exhibit "J" afforded no consideration for converting the optional, conditional obligation of respondents to petitioner by virtue of Clause 2 in relation to Clause 5 of Exhibit "J" into an absolute obligation:

First.—Petitioner under Exhibit "C" was bound to assist in financing the operation, of the property indefinitely.

Second.—Exhibit "J" by its own terms expressly admitted the obligation of petitioner to finance the operation of the property for an indefinite period of time:

> "WHEREAS, by agreement made and entered into by and between the Philippine National Bank, the Union Insurance Society of Canton, Ltd., and the Philippine Trust Company under date of January 5, 1923, the said parties agreed to form a corporation for the purpose of taking over the property, rights and franchises of the Mindoro Sugar Company covered by a certain second mortgage executed by said Mindoro Sugar Company in favor of the Philippine National Bank, and to advance to said corporation Peso for Peso all sums re-

quired by said corporation for the maintenance and operation of said property, rights and franchises." (Exhibit "J," R. 110-111.)

Third.—Exhibit "J" expressly states that Exhibit "C" was being cancelled at the request of petitioner:

> "WHEREAS, the Philippine National Bank now desires to cancel said agreement, * * *." (R. 111.)

Fourth.—Exhibit "J" shows that whatever obligations petitioner assumed under it were assumed for the purpose of securing the cancellation of Exhibit "C" and not for the purpose of securing new promises from the respondents:

> "WHEREAS, the Philippine Trust Company and the Union Insurance Society of Canton, Ltd., have agreed with the Philippine National Bank to cancel said agreement under the following terms and conditions: * * *." (R. 111.)

Fifth.—As a matter of fact, however, petitioner assumed no new obligations under Exhibit "J" but instead, the obligations which it had previously assumed under Exhibit "C" were reduced and curtailed as follows:

(a) The obligation of petitioner under Exhibit "C" to assist in the financing of the property for an indefinite period of time was reduced to the obligation under Exhibit "J" to complete the financing of the existing crop;

(b) The obligation of petitioner under Exhibit "C" to carry out the foreclosure of the second mortgage, bid the property in, and transfer it to the San Jose Development Company was reduced in Exhibit "J" to the obligation to maintain its second mortgage

in status quo only so long as respondents continued to finance the property with the understanding that at the option of respondents, the property should be sold under the judgment of foreclosure or the judgment assigned to respondents.

Sixth.—Petitioner was running absolutely no risk at all under its limited obligation in Exhibit "J" to assist in the completion of the financing of the existing crop for the reasons:

(a) All advances to the trustee for the financing of the property were, under the terms of the trust deed, preferred over all other liens (Section 10, Article II and Sec. 12, Article IV of Exhibit "A," Record 54, 64-65);

(b) Paragraph 4 of Exhibit "J" made special provision for the repayment of the crop advances by petitioner as follows:

> "4. If the share of the said proceeds pertaining to the Bank should not be sufficient to cover the advances made by the said Bank the balance unpaid shall be paid to the Bank out of the proceeds of the 1925-1926 crop and further that if the advances already made for the 1923-1924 crop shall not have been fully paid, including interest, any balance unpaid shall be paid to the Bank out of the proceeds of the said 1924-1925 crop, and if the same is not totally paid to the Bank out of the proceeds of the said 1924-1925 crop the balance owing shall be paid out of the proceeds of the 1925-1926 crop. If the proceeds of the sale of said 1925-1926 crop are not sufficient to cover the unpaid balance, the Philippine Trust Company, as Trustee, shall execute a chattel mortgage on the subsequent crops until the whole amount due, with interest, is paid." (R. 112.)

It should be noted that Paragraph 4 covers not only the advances to be made to complete the financing of the existing crop but also covers previous advances and for that reason makes a distinct concession to petitioner.

As can be seen from the above analysis of Exhibit "J," petitioner not only assumed no new obligations thereunder, but was in fact granted substantial favors thereby. The value to the petitioner of the limitation of its obligation to continue financing the operation of the property was demonstrated by subsequent events. Exhibits "A" and "B" of Exhibit "Q" (R. 149-153) show that almost ₱9,000,000.00 was advanced for the financing of the said property up to the time of its sale under the trust deed and that of that sum only ₱4,000,000.00 was recovered out of the proceeds of said operation. Petitioner by means of the provisions of Exhibit "J" recovered every centavo of the money advanced by it (Exhibit "K-1, Record 115-121). Respondents, however, who continued to finance the crop without the aid of petitioner from 1924 to 1929 bore the burden of the entire loss.

Seventh.—The purpose of the procedure stipulated in Exhibit "C" for the foreclosure of the second mortgage and acquisition of title by the San Jose Development Company subject to a renewed second mortgage in favor of the petitioner was to enable the San Jose Development Company to take any profits which arose from financing the operation of the property. The agreement of petitioner in Exhibit "J" to maintain its mortgage in status quo and to sell the property under the foreclosure or to assign the judgment to the respondents or their nominees was made for the same purpose, that is to say, to enable respondents

to obtain any profit which might arise from financing the operation of the property. Since petitioner had withdrawn from the financing agreement, it was no longer entitled to share in any profit which might arise therefrom. Petitioner had everything to gain and nothing to lose from such an agreement, for the reason that as long as respondents continued to finance the property, there was a possibility that its value would be enhanced to such an extent that it could be sold for a sum sufficiently in excess of the debts secured by the trust deed to pay off petitioner's second mortgage; whereas in the absence of such financing, petitioner's second mortgage was of absolutely no value. As subsequent events demonstrated, the property was not worth enough to cover more than a small fraction of the debts preferentially secured by the trust deed. Clause 5 of Exhibit "J" was, on the other hand, of importance to respondents only in the remote possibility of a successful financing, acquisition, and sale of the property. In the event of failing in their financing and promotion, respondents could always rely upon the trust deed to insure the return of at least a part of their preferred claim for advances to the Trustee. Since, however, the judgment of foreclosure on the second mortgage had already been obtained before the execution of Exhibit "J," a sale thereunder subject to the trust deed would have been simpler and possibly more feasible than a sale under the trust deed. Respondents were interested in petitioner's second mortgage for this reason only. To say that respondents were willing to guarantee the huge amount owing on petitioner's second mortgage merely for the purpose of providing a simpler mechanism with which to acquire the property is to make a claim which is utter-

ly preposterous. Such a claim is especially preposterous in view of the fact that under Exhibit "C," respondents already had the right to utilize that mechanism and also had the absolute engagement of petitioner to assist in financing the operation of the property indefinitely. Respondents actually offered to pay petitioner a small sum for its second mortgage in Exhibits "O" and "O-1" (R. 139-142) for the reason explained in Exhibit "O-1" that some legal expense and considerable time would be saved by executing the said second mortgage instead of the trust deed (R. 142). This offer was not, however, made at that late date by respondents for the purpose of acquiring the property and selling it at a profit under the option in Exhibit "J," but it was made for the sole purpose of selling the property to pay off the obligations in default under the trust deed including their own advances to the trustee. Petitioner after entertaining the offer of respondents for about a year (Exhibit "O-2"; R. 143) finally rejected the same in Exhibit "O-4" (R. 144-145) on the ground of an alleged "general understanding" with the respondent Philippine Trust Company that it would pay the full amount of its claim under said second mortgage. It is to be especially noted that petitioner in Exhibit "O-4" did not refer to any specific contract or written agreement but referred only to a "general understanding." Petitioner ever since has been attempting to locate where that alleged "general understanding" was expressed.

Alleged General Understanding that Respondents Pay Petitioner's Second Mortgage

Respondents are not certain from petitioner's petition and supporting brief due to their indefinite

character that the latter still adheres to its previous contention that such a general understanding existed, but we shall refute it because of the advisability of meeting every possible adverse contention.

Aside from the fact that such a general unwritten understanding would not obligate respondent corporations, it is clear that no such "general understanding" existed notwithstanding petitioner's reference thereto in Exhibit "O-4" (R. 144).

Petitioner copies Exhibit "F" in full in its petition (pp. 6-8). It contended before the courts below that the alleged general understanding was supported by the following clause of Exhibit "F":

> "We will further recognize the mortgage of the National Bank and, if we should sell the properties of the Mindoro Sugar Company, we will see that the purchaser makes satisfactory arrangements for the payment of the mortgage of the Philippine National Bank." (R. 102.)

Petitioner attempted in the Philippine Courts to deduce the alleged "general understanding" out of the above paragraph by saying that the word "if" means "when" and that the word "recognize" means something in the nature of a "guaranty."

Though it is true that the word "if" may mean "when" under special circumstances for the purpose of fixing the time at which a conditional obligation is to be performed *if the condition is fulfilled*, it never means "when" in the sense advanced by petitioner. It is always an indication of a contingency which may or may not occur. It never indicates an event which is certain to occur.

Petitioner also attempted to give some peculiar meaning to the word "recognize," implying that it meant something akin to "guarantee."

> "The word 'recognize' according to the best lexicographers signifies to admit, to acknowledge something existing before."
> (*Leak* v. *Bear*, 80 N. C. 271, 273.)

When respondents proposed to "recognize" petitioner's second mortgage, they were therefore merely proposing to admit its existence. This admission of its existence would, of course, be only an admission of its existence *as a second mortgage.*

In addition to the fact, however, that the word "recognize" does not in any way imply a guaranty, we have in the very same document Exhibit "F" the express refusal of respondents to guarantee the second mortgage of petitioner. (R. 101-102.)

In view of the express refusal of respondents in Exhibit "F" referred to above to guarantee payment of petitioner's second mortgage, it is impossible to interpret the word "recognize" as proposed by petitioner. Even in the absence of respondents' express refusal to guarantee petitioner's second mortgage, Article 1827 of the Philippine Civil Code would prohibit an implied guaranty.

> "Art. 1827. Guaranty shall not be presumed; it must be express and cannot be extended beyond its specified limits."

Petitioner attempts to glean some comfort from the fact that respondents said in Exhibit "F" that:

> "We cannot see our way clear to guarantee the payment of the said mortgage at any particular time," (R. 102.)

and claims that this amounts to an agreement to guarantee the payment of the mortgage at some time. It is upon such flimsy grounds as this that petitioner's claim for the payment of its second mortgage rests.

Article 1827 of the Philippine Civil Code just quoted was undoubtedly framed and enacted for the purpose of defeating the type of claim now being made by petitioner. When we consider that respondents just prior to the making of the above statement had expressed the opinion that the bondholders of Mindoro were under no obligation with respect to the mortgage held by the National Bank, it is difficult to understand how the petitioner could nevertheless make the claim that in the next breath respondents agreed to guarantee said mortgage (R. 102).

The Language of Exhibit "J" and Not That of Exhibits "F" and "G" Must Control

In citing and discussing Exhibits "F" and "G" both parties have presumed on the patience of the Courts for they are both mere letters in which tentative proposals were made and which were merged in Exhibit "J." The only language which is binding upon the parties is that used in the contract Exhibit "J" which was signed by the parties and approved by their boards of directors. If the language of Exhibit "J" differs in any respect from that of Exhibit "F" or Exhibit "G," it must be presumed in the absence of proof to the contrary that the differences were intentionally created by the parties. Since it would have been more natural for the parties in the absence of any reason to the contrary to have copied verbatim the proposition made in Exhibit "F," it must also be presumed that the parties were not satisfied with the language in said Exhibits "F" and "G." The language used in the contract actually entered into between the parties corresponding to that relied upon by petitioner in Exhibits "F" and "G" is as follows:

"The Second Mortgage of ₱250,000.00 of the Philippine National Bank to be recognized by the parties of the Second and Third Parts in the event of a sale of the properties of the Mindoro Sugar Company by the said parties when provision will be made whereby the purchaser will make satisfactory arrangements for the payment of the amount of the Mortgage of the Philippine National Bank." (Exhibit "J," R. 111.)

It is to be noted that in Exhibit "J" respondents agree to recognize the second mortgage of petitioner only in the event of a sale of the property by them, in which event respondents were to make suitable arrangements with the purchaser for the payment of petitioner's second mortgage. The words "in the event of" are so clearly words of contingency that it is idle to claim otherwise. The obvious reason for limiting the recognition of petitioner's second mortgage to the event of a sale of the property was that in the absence of its acquisition and sale by respondents under the plan embodied in Paragraph 5 of Exhibit "J" (R. 112-113), the mortgage would still be a mortgage of record though a second mortgage and would need no recognition as such. In the event respondents exercised their option under Paragraph 5 of Exhibit "J," however, to acquire the property by carrying out the foreclosure sale, petitioner's second mortgage would be extinguished as of record and respondents' promise to recognize it would then become important. Respondent's recognition of it, however, would of course be no more than a recognition or renewal of it as a second mortgage and would not amount to a guaranty of its payment, nor give it priority over the deed of trust as inferentially contended by petitioner.

True Intention of the Parties Under Paragraph 2 of Exhibit "J"

Paragraph 2 of Exhibit "J" provides:

> "The Second Mortgage of ₱250,000.00 of the Philippine National Bank to be recognized by the parties of the Second and Third Parts in the event of a sale of the properties of the Mindoro Sugar Company by the said parties when provision will be made whereby the purchaser will make satisfactory arrangements for the payment of the amount of the Mortgage of the Philippine National Bank." (R. 111.)

An examination of the above quotation shows:

First, that no obligation is imposed upon respondents to make a sale of the property. If such an obligation had been intended, it would certainly have been expressed and the words of option and of contingency "in the event of a sale" would never have been used.

Second, that the sale, the possibility of which is contemplated by Exhibit "J," is a sale by the parties of the second and third parts. Four parties signed the contract. The party of the first part was the Philippine Trust Company as trustee of the trust deed; the parties of the second and third parts were the Philippine Trust Company in its individual capacity and the Union Insurance Society of Canton, Ltd. in its individual capacity; and the party of the fourth part was the petitioner. Obviously, therefore, the sale referred to in Exhibit "J" was *not* to be a sale by the trustee who represented the bondholders under the trust deed and over whom respondents and particularly Union Insurance Society of Canton, Ltd. had no control; otherwise, Paragraph 2 would have referred to a sale by the party of the first part, the trustee,

instead of only to a sale by the respondents, the parties of the second and third parts.

An examination, also, of Exhibit "C," the prior contract (R. 80-83); of Exhibit "E," the memorandum of Mr. O'Malley (R. 97-101); and of Paragraph 5 of Exhibit "J" (R. 112-113) shows clearly what the parties were thinking of when they inserted Paragraph 2 in Exhibit "J." As will be recalled, the plan of the parties under Exhibit "C" was to acquire title to the property from the Mindoro Sugar Company through the foreclosure sale of petitioner's second mortgage. The property was then to be operated by the parties subject to the trust deed and a second mortgage to be given petitioner for the amount for which the property was bid in at the foreclosure sale of the second mortgage. We quote again from Exhibit "E" in its reference to Exhibit "C," as follows:

> "When execution is accomplished on this mortgage, the property covered thereby will be bid in by the operating partnership, operated for joint account under our said agreement until such time as it shows a profitable outturn, and then sold, any profit resulting to be divided equally between the Bank, the Union Insurance Society of Canton, and the Philippine Trust Company." (R. 99.)

At the time of the execution of Exhibit "C," the parties apparently hoped that the property could be operated at a profit and that it could then also be sold at a profit over and above the existing liens. It was undoubtedly such a sale as this that the parties were contemplating in Exhibit "J." Paragraph 5 of Exhibit "J" provided a substitute for the method of acquiring the property outlined in Exhibit "C." However, since Exhibit "C" had been cancelled and petitioner had

withdrawn from the financing agreement, the acquisition of the property by the respondents was made entirely optional with them.

> "The foreclosure proceedings instituted by the Bank shall remain in statu quo as long as the Philippine Trust Company and the Union Insurance Society of Canton, Ltd. continue to finance the crop and the operation of the Mindoro Sugar Estate with the understanding that *if at any time the Philippine Trust Company and the Union Insurance Society of Canton, Ltd., or either one, desire it,* the Bank will proceed to the sale of the properties under the judgment of foreclosure or will assign the said judgment to the Philippine Trust Company and the Union Insurance Society of Canton, Ltd., or to either, or their nominee as they or either one may desire." (Par. 5, Exhibit "J," R. 112-113.)

The words italicized in the above quotation are the strongest sort of words to express the fact that the acquisition of the property was optional with respondents. These words of option are in harmony with the fact that no obligation was imposed upon respondents to make a sale of the property even after its acquisition. It would have been foolish to have given respondents the option to acquire or not to acquire the property to be sold and then impose upon them the obligation of selling it. If the first step and prerequisite to the sale, the acquisition of the property by respondents, was optional it is clear that the sale itself was intended to be optional. When we consider also that the words referring to the sale are words of contingency, in the event of a sale, it is impossible, even if there were reasons for it, to draw the conclusion advocated by petitioner that respondents were under an obligation to make a sale of the property. Petitioner

in view of its deep anxiety to be released from the financing stipulated in Exhibit "C" was in no position to dictate in Exhibit "J" as to when or under what circumstances respondents should sell in the event of acquiring the property.

Returning to the conditional provisions or obligations of Clauses 2 and 5 of Exhibit "J" (R. 111-113) and the reasons or consideration for making them conditional as elucidated in the second special defense (R. 10-13), attention is called to the fact that, although petitioner discusses the acquisition of the property and the sale thereof by respondents as conditions precedent to the liability of the latter (Sup. Brief, p. 29 et seq.), and although petitioner suggests certain vague economic and technical reasons for the conditional obligations of the clauses mentioned, it studiously avoids and fails to discuss the simple reasons advanced by respondents in their second special defense as to why the obligations of the clauses in question were intended to be conditional and the reasons why there was no occasion for or purpose in the recognition of petitioner's second mortgage or in arranging with a buyer to pay (by giving another second mortgage) unless in the process of carrying out Exhibit "J" the second mortgage and the judgment of foreclosure thereon should be extinguished, in which event steps would be taken to reinstate or renew petitioner's second mortgage.

Referring to the agreement Exhibit "C," Mr. O'Malley in a memorandum sent to petitioner on November 9, 1923 (Exhibit "E") among other things said:

> "Accordingly, the contract of which attached is a copy, was drawn up and duly

executed by all parties, and as the first step, the Bank filed suit in Calapan to foreclose its mortgage for ₱250,000.00 on March 5, 1923.

"When execution is accomplished on this mortgage, the property covered thereby will be bid in by the operating partnership, operated for joint account under our said agreement until such time as it shows a profitable outturn, and then sold, any profit resulting to be divided equally between the Bank, the Union Insurance Society of Canton, and the Philippine Trust Company." (R. 99.)

The foregoing comment of Mr. O'Malley offered in evidence by petitioner in conjunction with Exhibit "C" itself shows conclusively that the sole reason for the foreclosure of the second mortgage by petitioner was its agreement so to do, as a part of the financing agreement Exhibit "C" from which petitioner withdrew, leaving respondents the entire burden of any further financing.

Nevertheless, we find in petitioner's supporting brief (Page 32) the following misleading statement:—

"This second mortgage had long been due and the Bank had instituted foreclosure proceedings against the properties of the Mindoro Sugar for the collection of the capital secured by said mortgage. * * * The foreclosure of the mortgage of the Bank was a danger to the rehabilitation plan of the Mindoro Sugar in which the respondents had pinned all their hopes. The respondents in order to avoid this danger, worked for and obtained control over the foreclosure of the mortgage of the Bank, in exchange for the security of the payment of the latter's credit at a certain, though indeterminate future time."

The short answer to all the foregoing in addition to what has already been said is that the cancellation of Exhibit "C" was agreed upon in Exhibit "J," the same instrument in which it is claimed by petitioner in effect that respondents were coerced into agreeing to pay the second mortgage by fear of its pending foreclosure. If there were the slightest foundation for that contention, why, we ask, did respondents consent to the gratuitous cancellation of Exhibit "C"? The Bank was not only committed indefinitely by Exhibit "C" to the three-party financing of Mindoro but was also committed indefinitely to the postponement of any proceedings by foreclosure or otherwise to collect its second mortgage and could, therefore, create no possible menace to "the rehabilitation plan of the Mindoro Sugar."

That the respondents were fully aware of this indefinite commitment of petitioner by Exhibit "C" before the execution of Exhibit "J" is proven by Exhibit "F" offered in evidence by petitioner and from which we quote as follows:—

> "We are of the opinion, after receiving legal advice, that the agreement entered into on January 5, 1923, by and between the Philippine National Bank, the Union Insurance Society of Canton, Ltd., and the Philippine Trust Company regarding the financing of Mindoro is binding upon the National Bank and that it cannot be relieved of its responsibility thereunder without consent of our respective companies. *We are further of the opinion that the bondholders of Mindoro are under no obligation with respect to the mortgage held by the National Bank* and we can not see our way clear to guarantee the payment of said mortgage at any particular time." (R. 101-102.)

Respondents decline to answer petitioner's learned discourse on general principles of contracts and particularly on the subject of treating nominally conditional obligations as binding covenants where no reason or consideration is disclosed for the conditional character of such obligations. We are sure, without making any examination of the authorities cited by petitioner at Page 31 of its Supporting Brief, that none of those decisions justify the conversion of such pronounced optional and conditional obligations as those of Exhibit "J" into absolute covenants, even without the disclosure of the reasons or consideration for their conditional craracter; but when there are as many simple and convincing reasons showing an intent to make the obligations conditional as surround the execution of Exhibit "J," then we feel assured that no respectable jurisprudence can be found to support petitioner's contention.

Petitioner says at Page 30 of its Supporting Brief:

> "The interpretation accepted by the decision appealed from is absurd."

If respondents' analysis of and comments on Clauses 2 and 5 of Exhibit "J" and on Exhibit "C" are correct, then the "absurdity" makes its bed in the supporting brief of petitioner.

Reasons Why Clauses 2 and 5 of Exhibit "J" Were Acceptable to Petitioner

The clear exposition by the second special defense (R. 10-13) not only covers the fact that the promise of respondents in the second clause of Exhibit "J" to recognize petitioner's second mortgage and to arrange with the buyer for the payment of such mortgage was

entirely dependent upon, and would be fulfilled only "in the event of the sale of the properties by the said parties" (the respondents) but gives the simplest and most convincing reasons why Clause 2 in relation to Clause 5 of said Exhibit "J" were agreed upon and why they were acceptable to both respondents and petitioner. This explanation is:

1.—The second mortgage of petitioner had been foreclosed in conformity with Exhibit "C," thereby converting it into a judgment which was worthless unless the property was greatly enhanced in value by financing increased acreage of sugar cane.

2.—The agreement of January 5, 1923 (Exhibit "C"; Record 80-83) between respondents and petitioner for such financing was cancelled as a part of the provisions of Exhibit "J" at the request of petitioner. The absolute character of such cancellation as to all parties concerned is emphasized by a part of the stipulation of facts as follows:

> "It is further stipulated that if the Articles of Incorporation of the San Jose Development Co. mentioned in said agreement of January 5, 1923 (Exhibit 'C' hereof) were ever drafted, that prospective corporation was never capitalized and never functioned." (R. 20-21.)

The San Jose Development Company was to have been the very foundation for the performance of the agreement Exhibit "C."

3.—After the withdrawal of petitioner from further financing except as to a crop loan for that year, there was no one left able and willing to finance the previous extensive plan for expansion of the Mindoro Sugar Estate which inspired the then cancelled agreement Exhibit "C," except respondents.

4.—In this situation it was stipulated in Exhibit "J" in connection with Clause 2:

> "5. The foreclosure proceedings instituted by the Bank shall remain in statu quo as long as the Philippine Trust Company and the Union Insurance Society of Canton, Ltd. continue to finance the crop and the operation of the Mindoro Sugar Estate with the understanding that if at any time the Philippine Trust Company and the Union Insurance Society of Canton, Ltd., or either one, desire it, the Bank will proceed to the sale of the properties under the judgment of foreclosure or will assign the said judgment to the Philippine Trust Company and the Union Insurance Society of Canton, Ltd., or to either, or their nominee as they or either one may desire." (R. 112-113.)

In consideration of being released from the financing provided by Exhibit "C" and thereby "passing the buck" to respondents, petitioner as a gesture costing it nothing whatever agreed to hold the foreclosure proceedings of its worthless second mortgage in statu quo, while respondents continued pouring their own millions into the financing of a hopeless project, until the Bank Commissioner investigated and stopped respondent Philippine Trust Company (a banking institution) from proceeding further, as disclosed by Exhibit "P" (R. 145-146). Petitioner also agreed if respondents should desire it, to proceed to the sale of the properties under the judgment of foreclosure or to assign the judgment to respondents or either of them or to their nominees—another gesture costing petitioner nothing but encouraging respondents to go on with their mad undertaking.

5.—Inasmuch as the conditional prospective sale of the property under foreclosure or assignment of

the judgment of foreclosure if requested by respondents as a preparation for the conditional acquisition and sale of such property by respondents (Clause 2) would wipe out petitioner's second mortgage, it was very reasonable to anticipate that condition by providing for a renewal of petitioner's second mortgage by the buyer who would presumably acquire the property subject to the Trust Deed.

6.—The language of Clause 2 clearly imports that respondents were to recognize petitioner's interest only as a second mortgage and the fact that in the event of a sale by respondents it was the purchaser who, at the instance of respondents, would "make *satisfactory arrangements* for the payment of the amount of the mortgage," shows conclusively that the satisfactory arrangements for payment was not to have been payment itself, but an arrangement therefor. The provision that the purchaser "make satisfactory arrangements for the payment of the amount of the mortgage" also clearly discloses that the parties had in mind the same arrangement which they stipulated in one of the clauses of the agreement of January 5, 1923 (cancelled as a part of Exhibit "J") which we again quote for emphasis as follows:

> "That the Bank agrees to proceed immediately to the foreclosure of its mortgage and either bid the property in for the amount of the claim when sold or to join with the other two parties in bidding it in, in the name of the San Jose Development Company. If the Bank bids the property in it agrees to transfer its title to the San Jose Development Company so organized for the sum so paid, and *take in payment a second mortgage on the property for said* amount." (R. 82.)

7.—The proofs show that the property originally covered by the second mortgage of petitioner was sold at public auction by the trustees for ₱3,000,000.00 and that at the time of such sale the property was encumbered by obligations including the bonds and interest secured by the Trust Deed having preference over the bonds themselves (Section 12, First Paragraph, Exhibit "A"; Record 64-65), aggregating ₱9,861,063.52. (See Exhibits "L-3" and "M"; Record 129, 135.) *It follows that, even if the promise of Clause 2 had been absolute, instead of conditional, the failure of respondents to acquire and sell the property and to make arrangements with a buyer to give petitioner another second mortgage would have caused the latter no conceivable damage.*

POINT 2.

No Sufficient Reason Stated for Granting Writ.

The only reason stated by petitioner for the allowance of the writ is that "the decision of the Supreme Court of the Philippines has departed from the accepted and applied principles and mandates of law and equity, an action which justifies the exercise of this Honorable Court's power of supervision." (Pet. p. 26.)

The foregoing is equivalent to saying that the decision is contrary to law and equity.

The last provision of Clause (b), Paragraph 5 of Rule 38 constitutes the rule of this Honorable Court within which petitioner should have brought itself if possible according to the facts. This rule is as follows:

> ". . . or *has so far departed from the accepted and usual course of judicial proceedings*, or so

far sanctioned such a departure by a lower Court as to call for an exercise of this Court's power of supervision."

If we understand this rule, it has to do with disregard of the usual course of judicial proceedings, like trying an accused without a complaint or indictment for example and has nothing whatever to do with substantive law or equity.

Inasmuch as the reason quoted is the only reason given by petitioner for the granting of the writ prayed for, we presume the petition should be dismissed for that reason alone, although it is the first experience of the undersigned in the interpretation of this rule of the Court.

POINT 3.

The Only Questions Raised by the Petition Are of Fact and Interpretation of Documents, and All of Which Questions Were Resolved by Both Philippine Courts Against the Contention of Petitioner.

For the proposition that this Court will not review concurrent findings of fact of both lower Courts, we cite the following decisions:

United States v. Commercial Credit Co., 286 U. S. 63, 52 Sup. Ct. Rep. 467, 76 L. ed. 978, 980;

Page v. Arkansas Natural Gas Corporation, 286 U. S. 269, 52 Sup. Ct. Rep. 507, 76 L. ed. 1093, 1098;

Compañia General de Tabacos v. Collector of Int. Rev., 279 U. S. 306, 49 Sup. Ct. Rep. 304, 73 L. ed. 704, 706;

Gauzon v. Compañia General de Tabacos, 245 U. S. 86, 38 Sup. Ct. Rep. 46, 62 L. ed. 165, 167-168;

Arana de Villanueva v. Villanueva, 239 U. S. 293, 36 Sup. Ct. Rep. 109, 60 L. ed. 293, 296;

Reavis v. Fianza, 215 U. S. 16, 30 Sup. Ct. Rep. 1, 54 L. ed. 72;
Gray v. Noholoa, 214 U. S. 108, 29 Sup. Ct. Rep. 571, 53 L. ed. 931.

For the further proposition that this Court will not disturb the concurrent views of the two lower courts as to the interpretation of contracts involved unless convinced that such views are clearly erroneous, see

Montelibano y Ramos v. La Compañia General de Tabacos, 241 U. S. 455, 36 Sup. Ct. Rep. 617, 60 L. ed. 1099.

POINT 4.

The Petition and Supporting Brief Violate Clause (d), Paragraph 2 of Rule 27, in that Neither Contains a Concise Statement of the Case

We have already referred to this matter in our argument (pp. 9-11, supra), but its determination will necessarily depend upon the inspection of the Court.

RESUMÉ

1.—Exhibit "A," the Trust Deed; Exhibit "B," the second mortgage of petitioner; Exhibit "D-1," the judgment of foreclosure of Exhibit "B"; Exhibit "C," the original contract of financing between petitioner and respondents; and Exhibit "J," the contract by which Exhibit "C" was cancelled and substituted, are in reality the only documentary evidence essential for a correct determination of the case.

2.—The priority of the Trust Deed over the second mortgage is recognized in all of these documents.

3.—None of the documents mentioned contain any indication of any obligation of respondents to guarantee payment of the second mortgage.

4.—Exhibit "F," relied upon by petitioner, denies any obligation on the part of respondents with regard to the second mortgage and expressly refuses to guarantee the same.

5.—There is no conceivable motive, consideration, *causa*, or reason for the guaranteeing of petitioner's second mortgage by respondents.

6.—Exhibit "C" obligated petitioner: (a) to share in the financing of the crops of the Mindoro Sugar Estate for an indefinite period of time; (b) to secure a transfer of the title to the equity in the property of the Mindoro Sugar Company to the San Jose Development Company through the foreclosure sale and resultant extinction of the second mortgage and the acceptance in payment therefor of only another second mortgage on the same property from the San Jose Development Company for the sum which might be bid therefor at the foreclosure sale.

7.—Exhibit "J" which was executed at the request of petitioner cancelled Exhibit "C," thereby releasing petitioner from the obligation to continue financing the crop of the mortgaged property thereunder beyond the existing year but holding petitioner, nevertheless, to a plan for transferring the equity in the property to respondents at their option so long as the latter should continue financing the property.

8.—The sale, the possibility of which is mentioned in Clause 2 of Exhibit "J" under which respondents were to make provision with the purchaser for the payment of the second mortgage, was entirely optional with respondents; no obligation to make such sale was ever expressed and it was referred to as a mere contingency; moreover, if made at all, it was to have been a sale under the circumstances contemplated in Mr.

O'Malley's memorandum Exhibit "E," that is to say, a sale after the acquisition of the equity in the property by the respondents through the foreclosure sale under petitioner's second mortgage but only after the operation of said property under the financing of respondents should have shown such a "profitable outturn" that it would be possible to sell the property subject to the deed of trust for enough to cover petitioner's second mortgage and make a profit besides (R. 99).

9.—The fact that the sale, the possibility of which is contemplated by Clause 2 of Exhibit "J" was to be made, if at all, by the parties of the second and third parts who were the individual respondents and not by the party of the first part who was the trustee under the deed of trust, is further and of itself conclusive proof that the sale, the possibility of which was contemplated by the said Clause, was such a sale as that referred to by Mr. O'Malley in his memorandum (R. 99), that is to say, not a sale under the trust deed by the trustee but a sale by respondents individually of the title to and equity in the property subject to the trust deed after the acquisition thereof by respondents through the foreclosure sale of the second mortgage or assignment thereof to them by petitioner in harmony with the plan first provided in Exhibit "C" and subsequently modified in Clause 5 of Exhibit "J."

10.—Not only was the necessity of making such sale made conditional and dependent upon the profitable outcome of the operation of the property and the will of respondents but even the necessary first step and prerequisite to the said sale, that is to say, the acquisition of the property by respondents, was made expressly optional with them by Clause 5 of Exhibit "J."

11.—The inability of respondents to make any profit out of the mortgaged property and the actual loss of millions of pesos in operating the same and the fact that the property sold by the trustee in execution of the trust deed brought only ₱3,000,000.00 or ₱6,800,000.00 less than enough to cover the debts due under the trust deed, demonstrate conclusively that *the sale*, the possibility of which was contemplated by Mr. O'Malley's memorandum, and by paragraph 2 of Exhibit "J," *would have been utterly impossible even if respondents had elected to acquire the property* (R. 99, 110-113).

12.—Respondents never acquired or sold the property, nor had they any control over it at the time of its sale under the trust deed.

13.—Clauses 2 and 5 were obviously incorporated in Exhibit "J" for the sole purpose of granting an option to respondents to acquire under the foreclosure sale of the second mortgage and to sell the property of the Mindoro Sugar Company subject to the trust deed and to provide in the event of their exercising that option for a new or renewed second mortgage upon the extinction of the old second mortgage in the process of such foreclosure sale.

14.—Article 1827 of the Philippine Civil Code provides that:

> "Guaranty shall not be presumed; it must be express and cannot be extended beyond its specified limits * * *."

15.—There is no sufficient reason stated in the petition for the granting of the writ.

16.—The only questions raised by the petition are questions of fact and interpretation of documents,

and all of which questions were resolved by both Philippine Courts against the contention of petitioner.

17.—The petition and supporting brief violate Clause (d), Paragraph 2 of Rule 27, in that neither contains a concise statement of the case.

RELIEF

For all of the reasons stated, respondents pray that the petition be denied, with costs against petitioner.

Manila, Philippines, June 12, 1940.

Respectfully submitted,

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I hereby certify that I have been served with three (3) copies of the foregoing brief, this .... day of June, 1940.

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